No. 10349

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION, a corporation, *Appellant*,

vs.

LAWRENCE P. BUNNEY, as Guardian of WILMER BUNNEY, a minor, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION

The plaintiff, appelleee, at all times herein has been and now is a resident of the State of Washington, residing in Skagit County.

The defendant, appellant, at all times herein has been and now is a corporation organized under the laws of the State of California and a resident of the State of California and has its principal place of business and home office in San Francisco, California.

The amount in controversy is in excess of Three Thousand Dollars ($3,000.), to-wit, in the sum of

Three Thousand Eight Hundred and Seventeen Dollars and Twenty Cents ($3,817.20) plus interest costs and disbursements.

The action was commenced in the Superior Court of Skagit County, State of Washington, by serving and filing summons and complaint (Tr. 3) and was removed to the United States District Court at Bellingham, Washington, by the defendant by filing Petition for Removal (Tr. 9), Notice of Intention to Remove (Tr. 8) with Removal Bond (Tr. 16), upon which after appropriate hearing the Superior Court ordered removed to the United States District Court, Western District of Washington, Northern Division (Tr. 13).

The action was for recovery on an insurance policy, issued by defendant corporation and alleged to cover personal injuries received by plaintiff.

The District Court had jurisdiction as shown in the following extract of United States Judicial Code 28 U.S.C.A. Section 41 (Judicial Code, Sec. 24 Amended):

> "The District courts shall have original jurisdiction as follows:
>
> "1. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of different States; or, where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, * * * (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. * * * " (R. S. Secs. 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552;

Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091; May 14, 1934, c. 283, Sec. 1, 48 Stat. 775; Aug. 21, 1937, c. 726, 50 Stat. 738).

This suit was removed to the District Court under the following statutes:

28 U.S.A.C. Sec. 71 (United States Judicial Code, section 28 as amended):

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, by this title (the Judicial Code) which may now be pending or which may hereafter be brought in any State Court may be removed by the defendant or defendants herein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, by this title (the Judicial Code) and which are now pending or which may hereafter be brought in any State court may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State, and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *" (Mar. 3, 1875, c. 137, Sec. 2, 18 Stat. 470; Mar.

3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug 13, 1888, c. 866, 25 Stat. 433; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 28, 36 Stat. 1094; Jan. 20, 1914, c. 11, 38 Stat. 278).

The Circuit Court of Appeals has Appellate Jurisdiction in this case under the following:

28 U.S.A.C. Sec. 225 (Judicial Code, section 128, amended):

> "(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238. * * * "
>
> "(d) The review under this section shall be in the following circuit courts of appeal; the decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State; * * * "

The pleadings necessary to show the foregoing are the

> Complaint (Tr. 3).
> Answer (Tr. 20).
> Notice of Intention to file Petition for Removal (Tr. 8).
> Petition for Removal (Tr. 9).
> Reply (Tr. 29).
> Order of Removal (Tr. 13).
> Bond on Removal (Tr. 16).
> Notice of Appeal (Tr. 131).
> Supersedeas and Cost Bond on Appeal (Tr. 132).
> Stipulation for Appeal and Supersedeas Bond on Appeal (Tr. 132).

STATEMENT OF THE CASE

The Associated Indemnity Corporation, defendant and appellant herein, had issued its liability insurance policy to "David Bunney & Clarence Bunney doing business as Bunney Bros." (Plaintiffs' Exhibit 1, Tr. 45 to 95) covering one Ford 1935 1½ ton Dump Truck, which will be hereinafter referred to as the "1935 truck," There are two trucks involved in this case, the other one being a 1938 truck and it will be hereinafter referred to as the "1938 truck." It will be necessary therefore to bear in mind whether the truck being talked about is the "1935 truck" or the "1938 truck."

The policy covered liability and property damage in the sum of $5000 for one person injured. There being only one person injured we are concerned only with that feature of the policy.

Bunney Bros. were generally engaged in hauling work using a truck under a permit issued by the Department of Public Service of the State of Washington and the policy with endorsements was issued to comply with said permit.

Some days prior to the 4th day of January, 1940, David Bunney, owner of the 1935 truck, negotiated with the Pound Motor Company of Mt. Vernon, Washington, for the purchase of a used 1938 truck. An agreement was finally reached whereby Bunney was to turn in to Pound Motor Company the 1935 truck and pay in addition the sum of $339.00, the cash balance due after crediting him with the agreed price of $375.00 for the 1935 truck. Bunney took physical possession and delivery of the 1938 truck on *January*

4, 1940. On this day also he went to the First National Bank of Mt. Vernon, Washington, and placed a chattel mortgage on the 1938 truck with other property, for the sum of $585.56. On this day also he turned over actual physical possession of the Washington State Registration Certificate covering the 1935 truck to the Pound Motor Company.

The 1935 truck body was made of steel and Bunney desired to retain it and put it on the 1938 truck and it was agreed by the Pound Motor Company that he could do that and that Bunney would transfer a wooden body to the 1935 truck. A member of the Pound Motor Company had viewed the wooden truck body and it was acceptable to him. As hitherto pointed out, all this happened on or before January 4, 1940.

The next day, January 5, 1940, Bunney intended to change the truck bodies. He tried to start the 1935 truck which was standing alongside his house in a stub ended road but it became mired in the mud and would not go further. He therefore arranged with another brother, Daniel Bunney, to take the 1938 truck and help pull the 1935 truck out of the mud. The 1938 truck was fastened to the front end of the 1935 truck with a tow line and by reason of the angle of tippage of the 1935 truck the engine would not start. David Bunney thought that the reason for the failure to start was that the angle of tippage was so great that gasoline would not run from the tank into the carburetor. He therefore summoned Wilmer Bunney, the plaintiff herein, a boy of the age of 13 years, and instructed him to take a tomato can of gasoline and get up on the truck and pour the gasoline into the

carburetor. Wilmer did this and while he was pouring the gasoline into the carburetor David Bunney, who was seated at the wheel of the 1935 truck, stepped on the starter. The spark ignited the gasoline and Wilmer was burned by the resultant flame. According to the testimony at the time no effort was being made by the 1938 truck to pull the 1935 truck.

The accident happened January 5, 1940, and the Insurance company was notified for the first time February 1, 1940.

Wilmer commenced an action against David and Clarence Bunney, doing business as Bunney Brothers, and Pound Motor Company for his personal injuries. He obtained a judgment against Bunney Brothers in the sum of $3780.00 and costs of $37.00. The defense of said action was tendered to defendant herein but was declined by the defendant company. Suit was instituted in the Superior Court of Skagit County, Washington, against the defendant Associated Indemnity Corporation which was removed to the United States District Court, Western District of Washington, Northern Division, on account of diversity of citizenship. Trial was had there before Hon. Jeremiah Neterer and a jury resulting in a verdict against the Associated Indemnity Corporation in the sum of $4258.65.

No notice of the accident was given to the Company until February 1, 1940.

The policy contained the following in Paragraph V on page two (Tr. 78):

> "Automatic Insurance for Newly Acquired Automobiles. If the named Insured who is the

owner of the automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the *date of its delivery to him*, subject to the following additional instructions: (1) if the company insures all automobiles owned by the named assured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the *date of such delivery*, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy but only to the extent applicable to the replaced automobile; (3) *the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery;* * * * " (Italics ours)

That said policy also contains the following under "Exclusions" on page three (Tr. 79):

"This policy does not apply: (2) * * * to any accident which occurs after the transfer during the policy period of the interest of the named insured in the Automobile, without the written consent of the company." (Defendant Company gave no such consent).

That said policy provided as follows, page three (Tr. 80):

"This Policy does not apply, under Coverages A, B, C and C-1, nor under insuring agreement II while the Automobile is operated by any person under the age of 14 years * * * ."

That Wilmer Bunney was assisting in the operation of said truck at the time of the accident and was of the age of 13 years.

The policy contained under Exclusions on page 3 thereof (Tr. 80) the following:

> "This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any Insured, other than domestic employment, or in the operation, maintenance, or repair of the Automobile; or to any obligation for which any Insured may be held liable under any workmen's compensation law."

The Policy contains the following endorsement (Tr. 55):

> "It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or alighting from the automobile."

That the Department of Public Service Endorsement attached to the policy also contained the same words as stated in the immediately preceding paragraph (Tr. 63).

That said Department of Public Service Endorsement attached to said Policy also contains the following (Tr. 65):

> "This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of the said insured engaged in the operation and maintenance of any automobile or any other employee of the in-

sured arising out of or in the usual course of the trade business, profession or occupation of the insured."

The Policy contained the following (Tr. 87):

"9. Notice of Accident, Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative."

These questions were raised by instructions given and exceptions thereto and instructions requested by appellant and refused by the court with exceptions thereto; by motion to dismiss at the close of the case and the denial thereof; by motion for judgment notwithstanding the verdict of the jury and denial thereof and upon motion for new trial and denial thereof.

SPECIFICATION OF ERRORS RELIED UPON

The Court erred:

1. In not sustaining appellant's challenge to the sufficiency of the evidence to sustain any verdict against the defendant at the close of the case and in not entering judgment of dismissal at that time, upon defendant's motion for same (Tr. 183) and not granting defendant's Motion for judgment notwithstanding the verdict or granting a New Trial (Tr. 126-127).

2. In limiting the jury to the ownership of the 1935 truck on June 5, 1940; the position of the minor claimant upon the truck at the time of the accident and the activity of David and Daniel Bunney at the time of the accident with relation to the attempted movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it (Tr. 186); then, in the next sentence telling the jury that the last two issues are not material in this case and telling the jury that the first open issue was the ownership of the 1935 truck on January 5, 1940. The charge of the court on this point *in totidem verbis* is as follows (Tr. 186):

> "Upon the certificate of admissions made by the respective parties you are not concerned. Those facts are established. The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownershp of the truck referred to as the 1935 truck, on the 5th of January, 1940. That is the date upon which the accident happened. Another open question is the position of the minor plaintiff in this case with relation to the automobile at the time that he was pouring gasoline from his

tomato can into the carburetor, whether he was on the car or whether he was partially on the car, or whether he was standing on the ground. And the other is the activity of David and Daniel Bunney at the time of the accident with relation to the attempted forward movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it. I instruct you that, so far as these last two open issues are concerned, they are not material in this case and your attention will be directed to the first open issue, and that is; who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident. * * *" (Tr. 197).

And the exception thereto is as follows:

"Excepts to the instruction where it says that the jury is limited to the 1935 truck as decisive of this action, completely eliminating the theory of the case of the defendant that the automatic exclusion in the policy operated to terminate the coverage on the 1935 truck the moment the delivery was accepted of the 1938 truck. The court not only failed to submit that to the jury, but instructed them on that automatic insurance provision that the only question there was the ownership of the 1935 truck, which completely misses the point." (Tr. 197)

"By THE COURT: Exception noted. I think the instruction was right."

3. The court erred in removing from the consideration of the jury the question of whether or not the plaintiff boy was riding in or upon the truck at the time of the accident under the exemption of the policy and the endorsements excluding coverage to persons

"entering upon, riding in or alighting from the automobile" the court instructing as follows (Tr. 190):

> "Another exemption urged by the defendant is that the boy was riding upon the automobile when he was injured. This exclusion clause appears in the rider under 'Passenger Exclusion Clause' which removes from its operation one entering * * * . And it may appear in the Public Service upon, riding in, or alighting from the automobile endorsement as stated by Counsel. To make the application of this exemption, the relations of the boy to the automobile at the time, the business in which Bunney Brothers were then engaged, and what the boy was doing, must be considered with the term 'passenger.' It may be said that a passenger, in the ordinary sense of the meaning of the term, and its legal sense as well, is one where the traveller rides in a public conveyance used or provided by the carrier for that purpose, and by virtue of an express or implied contract with the carrier for that purpose for the transportation from one place to another, usually for the payment of a fare or that which is equivalent to a fair consideration. In this case, the testimony shows that the Bunney Brothers were engaged in a dump truck business, not in passenger service. The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in any sense, and that did not make him a passenger within the sense of that exemption." (Tr. 190)

Exception on Tr. 197-198 as follows:

> "And excepts to the instruction of the court removing from the consideration of the jury the matter of whether or not this boy was riding in

or upon the truck at the time, and labelling it passenger traffic exclusion, as a matter of fact, not calling attention to the jury that the Department of Public Service endorsement has it in there and does not call it passenger traffic exclusion, but has it in there that coverage shall not apply to any claim for bodily injury or death. That should have been given to clear that up."

"By THE COURT: Note an exception." (Tr. 198)

"Excepts to the instruction by Your Honor that the Bunney Brothers were not in the passenger carrying service, as an indication that that would have some bearing upon the matter, when it would not have in this particular case, because, obviously, a truck driver or operator can carry passengers and not be in the passenger carrying service, and the instruction in that way is prejudicial to the defendant."

"By THE COURT: Note an exception." (Tr. 198)

"And also excepts to Your Honor instructing the jury that the boy sitting on the fender did not make him a passenger because of the fact that the car was not moving. The law is that a car need not be moving to have some one riding in it."

"By THE COURT: Note an exception. This was not such a case." (Tr. 198)

4. The court erred in removing from the jury the matter of delayed notice given to the defendant in this case. The court instructing as follows:

"The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pretrial hearing, the notice was

sufficient and timely given, and could not be urged in this suit as against this boy and no prejudice did result to the defendant company in making its investigation of all witnesses who were familiar with the facts and all of them were then available." (Tr. 189)

Exception on Tr. 198:

"Also excepts to the instruction of the court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate that considered they had no coverage, and it should have gone in, at least for that purpose."

"By THE COURT: Note an exception. I am satisfied with the instruction." (Tr. 198)

5. The court erred in instructing that the plaintiff boy was not an employe and in instructing that the boy could not make a contract as a matter of law. The court instructed as follows:

"One defense states that the injured boy was an employee and is not covered by the policy. Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, nor performing anything but a casual, gratuitous service. There must be a continuity of acts, either pursuant to an agreement of the minds, or willingly performed on the one side and acceptance on the other, upon which an implied contract might be inferred, and these acts and these conducts must be done by persons who are competent to enter into arrangements or agreements. The boy in this case was thirteen years of age. He was therefore, incompetent to enter into

this employment, or any other employment, without the consent of his guardian, or without the consent of his father and mother or one or both of them, and in this case that was not done, so he was not an employee. * * * " (Tr. 189)

To which we excepted as follows (Tr. 198):

"Also excepts to the instruction of the court that this boy was not an employee, and the instruction of the court that he could not make a contract as a matter of law. The boy can make a contract, but it is voidable only, not void, and that is excepted to by the defendant because we believe that he was an employee at that time."

"By THE COURT: Note an exception. There was nothing to indicate that he was an employee under the general rule." (Tr. 198)

6. The court erred in instructing that this plaintiff was not a servant operating or repairing, or, or engaged in operating, repairing or maintenance of the truck. The court's instruction on this was as follows:

Page 44: " * * * Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, not performing anything but a casual, gratuituous service * * * ." (Tr. 189)

and again (Tr. 190):

"* * * The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in any sense." (Tr. 190)

"Another exemption urged by the defendant is that it excluded benefits to one injured when the automobile was being operated by one under fourteen years of age. This boy was thirteen years of age and, it is claimed, was operating the

truck and recovery cannot be had. You are instructed that, within the meaning of this policy this boy was not operating this truck when he was injured. The truck was not in motion. It was not in a condition where it could be operated. The boy was merely pouring gasoline out of a tomato can into the carburetor, which is the container where the air and gasoline are mixed. The boy did not have control or anything to do with the steering wheel, nor the connecting of the clutch, or disconnecting it, with the power, or anything else save and except as indicated, pouring gasoline from the tomato can into the carburetor and this exemption, therefore, is not available to the defendant. The operation of the truck was authorized as intrastate irregular route and nonradial service as a carrier engaged in dump truck operations, and they are not engaged in passenger business, nor is there anything to show there was any intent or purpose of carrying the boy on this truck in violation of the permit to operate it, and the fact that the boy may have been sitting astride the fender pouring gasoline does not bring him within the exemption claimed." (Tr. 191)

To which we excepted as follows:

"Excepts also to the court instructing the jury that the boy was not operating the truck because it was not in motion, and the statement that the boy had nothing to do with the operation, when as a matter of fact the defendants believe that he was assisting in the operation of the truck, and the jury should have been instructed that way." (Tr. 199)

"By THE COURT: Note an exception." (Tr. 199)

"And also excepts to the instruction of the

court that this boy was not a servant operating or repairing, or engaged in operating, repairing or maintenance of the truck, when we believe he would come under that heading." (Tr. 199)

"By THE COURT: Note an exception." (Tr. 199)

7. The court erred in instructing the jury on deliverable condition. The court's instruction being as follows (Tr. 192):

"You are instructed, that in determining whether the ownership of the 1935 truck was in Bunney Brothers on January 5th, 1940, or whether it had passed to Pound Motor Company, the law then in force in the State of Washington, among other things, provided that, where there is a contract to sell specific articles, the property in them is transferred to the buyer at such time as the parties to it intended it to be transferred. For the purpose of ascertaining the intention of the parties, regard may be had to the terms of the contract, the conduct of the parties, uses of the trade, and circumstances of the case. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting the goods in a deliverable state, the property does not pass until such things are done. If the contract requires that the seller do certain things to deliver the goods to the buyer, to pay the freight, or to deliver to a particular place, the property does not pass until the goods are delivered to the buyer, or have reached the place agreed upon." (Tr. 192)

To which the appellant excepted as follows:

"Excepts to the instruction of the court which applies to undeliverable condition, because that would not apply in this case, because Pound went out there, saw the body, was satisfied with it, and nothing left to do but put the two together and take them in. I don't believe it is applicable to say that they were not in deliverable condition because they could have been delivered in that condition." (Tr. 200)

"By THE COURT: Note an exception." (Tr. 200)

8. Before the court instructed the jury the following proceedings took place (Tr. 184):

"By MR. PEARSON: Your honor has considered the fact that it states in there, (in the policy) that, upon the delivery of the 1938 truck, it terminates automatically on the 1935 truck?"

"By THE COURT: Yes. We are not concerned with that insurance now in connection with the automatic effect on the new vehicle, *and I shall have to instruct the jury that it remains on the old vehicle until the title left the Bunneys, and that would include delivery. That issue of delivery is an issue of fact.*" (Tr. 184)

and the court did instruct as follows:

" * * * The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownership of the truck referred to as the 1935 truck, on the 5th of January, 1940. That is the date upon which the accident happened." * * *

"And your attention will be directed to the first open issue, and that is: who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident." (Tr. 186)

And further, the court instructed on this point (Tr. 192):

"If the car was retained by Bunney Brothers for the purpose of taking from it the body to be placed on the new chassis and it was then to be delivered, then the policy would still be in force as to the car and it would be covered under this policy. The owner's certificate, the license certificate, may have been delivered and the money paid, and still, if delivery of the truck was retained, the ownership would still be in Bunney Brothers so far as this policy is concerned. * * *"

And further (Tr. 194):

"You are instructed that, if you find by a fair preponderance of the evidence that at the time here in question Bunney Brothers were the owners of the truck, then the provisions of the policy of insurance and the endorsements or riders thereon, issued by the defendant Associated Indemnity Corporation applied to the operation of the truck."

"You are not concerned in this case with the automatic effect of the policy on the 1938 car. We are not concerned with that. We are only concerned with whether the policy covered this 1935 car, and if the car was not delivered pursuant to the arrangement between Bunney Brothers, under their contract with the Pound Motor Company, that it was to be delivered, or that possession was to be retained until the bodies were changed and then delivered, then the title remained, so far as this insurance is concerned, in Bunney Brothers, and was in Bunney Brothers on the 5th of January, 1940." (Tr. 194)

To which we excepted:

"Excepts to the instruction of the court also

that, as long as the title to the 1935 truck remained in Bunney Brothers, they would be covered, when, under the policy and its various riders and exclusions, that would not be the fact in a number of instances."

"By THE COURT: Note an exception." (Tr. 200)

9. And in instructing along similar lines in the following (Tr. 193):

"If you find from a fair preponderance of the evidence that, on January 5th, 1940, that under an oral agreement made between David Bunney, acting for Bunney Brothers, and Pound Motor Company, Bunney Brothers agreed to sell and Pound Motor Company agreed to buy this 1935 truck, and the parties agreed that it was the intention of the parties by such agreement that the actual ownership of this truck was to remain in Bunney Brothers until the body thereon had been exchanged and the truck was delivered to the place of business of the Pound Motor Company by Bunney Brothers and that this had not been done at the time of the alleged injury to the child on January 5th, then you are instructed that Bunney Brothers were on that day the owners of the truck so far as this policy of insurance is concerned, and the defendant's policy of insurance covered the case and protected other parties for bodily injuries arising out of the ownership or use of the truck by Bunney Brothers, according to the provisions of said policy and the endorsements or riders thereon considered as a whole." (Tr. 194)

The exception being as follows (Tr. 199):

"Excepts to the instruction of the court that if title passed, there was no coverage, but that the 1935 truck would still be covered until the

delivery to the Pound Motor Company, when that is not the gist of the matter. The gist of the matter is that the title has nothing to do with the 1935 truck, but upon the delivery of the 1938 truck, the policy passed from the 1935 truck, and the 1935 truck would not be covered, and there was a change of interest under the policy which excluded that coverage. That was not covered.

"By THE COURT: Note an exception." (Tr. 200)

10. The court erred in refusing to give a requested instruction as follows:

"The court instructs the jury that you are to find for the defendant."

To which the defendant excepted as follows (Tr. 200):

"Excepts to the failure of the court to give the requested instruction to find for the defendant, because the defendant believes that, under the law and evidence, that should have been done.

"By THE COURT: That was denied. Note the exception." (Tr. 200)

11. The court erred, with the exception thereto, in failing to give the following requested instruction (Tr. 201):

"Excepts also to the failure of the court to give the requested instruction as follows:

"You are instructed that the mere fact that David Bunney desired to transfer the body from the 1935 Ford truck is no indication and is not to be taken by you that he had any title in or to said truck on and after the 4th of January, 1940, if you find that he sold and delivered title

of said truck to other parties on January 4th, 1940."

"The failure to give that, I think, was prejudicial to the defendant." (Tr. 201)

"By THE COURT: Note an exception." (Tr. 201)

12. The court erred with the exception thereto, in failing to give the following instruction:

"Except to the failure of the court to give our requested instruction reading as follows: 'If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant'." (Tr. 201)

"By THE COURT: Note an exception." (Tr. 201)

13. The court erred with the exception thereto, in failing to give the following instruction (Tr. 201):

"Except also the failure of the court to give our requested instruction that:

" 'If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word "riding" does not necessarily mean that the truck would have to be in motion, the fact that he was in or on the truck would be sufficient to come within the meaning of the word riding.'

"By THE COURT. Denied. Note an exception. I think I covered it." (Tr. 202)

14. The court erred with the exception thereto, in

failing to give the following requested instruction (Tr. 202):

> "Excepts to the failure of the court to give the following requested instruction (Tr. 202):
>
> "'You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers or either of them, purchased a 1938 Ford truck trading said 1935 Ford truck to said Pound Motor Company as a part of the purchase price and paying the balance due on said 1938 Ford Truck in case and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford truck then I charge you that said insurance written by defendant on said 1935 truck automatically terminated upon said 1935 truck and automatically covered the 1938 Ford truck and that the policy did not cover the said 1935 Ford truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant.' "Failure to give that was certainly a body blow to the defendant, because that was one of the main points we relied upon, was the coverage on the 1935 truck automatically changing upon delivery of the 1938 truck." (Tr. 202)
>
> "By THE COURT: Note an exception. I think I covered that."

15. The court erred with the exception thereto, in

failing to give the following requested instruction (Tr. 203):

> "And finally, excepts to the failure of the court to give the requested instruction as follows:
>
> "'You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of fourteen years and if you find that said Wilmer Bunney was under the age of fourteen years and was assisting in the operation of said truck at the time of the accident then I charge you said insurance policy did not apply at the time of said accident your verdict must be for the defendants.'
>
> "By THE COURT: Note an exception." (Tr. 203)

SUMMARY

A summary of the case is as follows:

Associated Indemnity Corporation, appellant herein, defendant below; issued its insurance policy to David Bunney and Clarence Bunney doing business as Bunney Brothers, covering a 1935 truck owned by David Bunney for liability and property damage. The policy with a number of endorsements attached thereto is in evidence (Tr. 45 to 95).

The policy provided, as is set out fully in the Statement of the Case *ante* that if the insured acquired ownership of another automobile to replace the one insured then the insurance transfers to the newly acquired automobile and automatically terminates upon the replaced automobile at the date of the *delivery* of the *new* automobile to the insured (Tr. 78).

The policy also provided that it did not apply to any

accident that occurred after the transfer during the policy period of the interest of the insured in the automobile, without the written consent of the company (Tr. 79).

The policy also did not apply while the car was being operated by any person under the age of 14 years (Tr. 80); nor to the bodily injury or death of any employe of the insured or in the operation, maintenance, or repair or the automobile (Tr. 80); nor to accidents to any person while riding upon, riding in or alighting from the automobile (Tr. 55 and 63) and also provided for the giving of written notice to the company of an accident as soon as practicable.

On January 4, 1940, David Bunney sold the 1935 truck covered by the policy to Pound Motor Company, trading in the 1935 truck on a 1938 truck getting a credit of $375 for it. On that same date, January 4, 1940, it is admitted (Tr. 181) that he took delivery of the 1938 truck; took actual physical possession of it; took it to the First National Bank at Mt. Vernon, Washington, and placed a chattel mortgage on it for $585.56 (Tr. 181). He also on that date delivered to the Pound Motor Company the Washington State Registration Certificate on the 1935 truck (Tr. 176).

David Bunney wanted to retain the steel body on the 1935 truck and put it on the 1938 truck. This the Pound Motor Company permitted him to do (Tr. 174-175).

The next day, January 5, 1940, while attempting to move the 1935 truck it became mired in the mud and the engine ceased to run. This was thought to be due to the angle which the truck was leaning by reason of

one set of wheels being in the ditch, preventing gasoline from flowing into the carburetor.

Wilmer Bunney, a nephew of David Bunney, a boy of 13 years was playing in an adjacent yard. He was summoned by his uncle David Bunney and told to take a tomato can of gasoline and pour it into the carburetor. In order to do this he climbed up on the fender. As he poured the gasoline into the carburetor, David, who was sitting at the wheel of the truck, stepped on the starter and the resultant spark ignited the gasoline, burning Wilmer Bunney (Tr. 163, 167).

While this was going on Daniel Bunney, another of the senior Bunney Brothers, was sitting in the cab of the 1938 truck ready to help pull the 1935 truck should it get the engine started. He, however, was not actually pulling on the truck at the time of the accident (Tr. 168).

The accident happened January 5, 1940, and the insurance company, defendant herein, was not notified until February 1, 1940 (Tr. 38).

Wilmer Bunney sued David and Clarence Bunney and Pound Motor Company for his personal injuries. This was in the Superior Court of Skagit County, Washington. He obtained a judgment against all parties in the sum of $3870 and costs of $27.00. The defense of this suit was tendered to Associated Indemnity Corporation by Bunney Brothers but was declined. Pound Motor Company appealed the judgment to the Supreme Court of the State of Washington and the judgment as to the Pound Motor Company was reversed.

Associated Indemnity Corporation, refusing to pay

the judgment, suit was instituted against the defendant in the Superior Court of Skagit County, Washington, and was removed to the United States District Court for the Western District of Washington, Northern Division. Upon trial in the District Court before the Honorable Jeremiah Neterer and a jury a verdict was rendered against the defendant Associated Indemnity Corporation in the amount of $4258.65 (Tr. 129).

Motion to dismiss at the close of plaintiff's case and Motion for Judgment Notwithstanding the Verdict of the Jury and Motion for New Trial were all denied and exceptions allowed (Tr. 138, 126, 127).

Whereupon this appeal followed.

ARGUMENT

The Automatic Coverage Provision
Errors 1, 2, 7, 9, 10, 14

It is the contention of appellant that whatever happened to the 1935 truck after the delivery of the 1938 truck on January 4, 1940, is immaterial. There is no question raised as to its delivery.

Witness the following:

> Q (By MR. PEARSON): Handing you Defendant's Exhibits A-1, A-2 and A-3, which is, A-1, automobile purchase order, photostat copies; A-2 is the receipt for $339.00, and the other is a chattel mortgage on the 1938 truck. I ask if you recognize those? Are those the instruments covering that deal?"
>
> By MR. WELTS: "We object to those as immaterial and irrelevant, because *we don't question but what, on January 4th, Bunney came into ownership of the 1938 cab and chassis and drove it home.*"
>
> By MR. PEARSON: "And took delivery on that date?"
>
> By THE COURT: "*I think it is all admitted that the truck was taken over.*" (Tr. 180-181)

This point has been passed upon by the courts; a leading case being *Merchants Mutual Casualty Co. v. Lambert*, 90 N.H. 507, 11 Atl.(2d) 361, in which it was held that the insurance was automatically transferred under a similar provision in the policy, to the new car, and that the old car was no longer covered.

In that case which was for a declaratory judgment to determine the rights of the parties the facts were as follows:

The Merchants Mutual Casualty Co. issued its pol-

icy of insurance to defendant Lambert covering a 1930 Pierce Arrow car. The policy contained the automatic coverage provision the same as the policy involved in the instant case. The policy provided as ours does that

> "(3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery,
>
> "Between October and December 1, 1938, the 1930 Pierce-Arrow sedan was not used by the defendant because the car was worn out, out of repair, and not fit to be driven on the public highway. * * * December 1, 1938, the defendant Lambert bought a 1935 Pierce-Arrow car. * * * This was a seven passenger model like the 1930 car and was purchased for the defendant Lambert's business to replace the 1930 car for the very same use previously made of the 1930 automobile.
>
> "On December 1, 1938, the defendant Benjamin C Lambert, while driving the said 1935 Pierce-Arrow sedan which he had just purchased and acquired title to, was involved in an accident with a truck owned by the defendant Robert's Express, Inc., and operated by the deceased George C. Gosselin in which accident the truck of the defendant Robert's Express is alleged to have been damaged, and the deceased George C. Gosselin is alleged to have received personal injuries resulting in his death. At the time of the accident, December 1, 1938, the defendant, Lambert still owned the 1930 Pierce-Arrow sedan. It was in his garage with New Hampshire number plates attached and was registered in his name at the Motor Vehicle Department. * * *"

The court said, in deciding that the 1935 car was covered and that the coverage had been automatically transferred to it from the 1930 car:

> "The principal argument advanced by the plaintiff is, in substance, that the finding of the trial court 'that the 1930 Pierce-Arrow sedan was replaced by the 1935 Pierce-Arrow December 1, 1938,' is inconsistent and irreconcilable with the other findings of the court that 'at the time of the accident, December 1, 1938, the defendant Lambert still owned the 1930 Pierce-Arrow sedan. It was in his garage with New Hampshire number plates attached and was registered in his name at the Motor Vehicle Department.' The position of the plaintiff is thus set forth in his brief. 'Coverage on the 1930 car would not cease, and coverage on the 1935 car would not be effective, until the defendant had relegated the 1930 car to an unusable status by transfer of its registration and number plates to the 1935 car, so that the latter could be legally run on the highway and had paid petitioner any additional premium required because of the application of the insurance to the 1935 car.' A similar argument was rejected by the California Court of Appeals in *Dean v. Niagara Fire Insurance Company*, 24 Cal. App.(2d) Supp. 762, 68 P.(2d) 1021, and the present argument cannot prevail because the acts enumerated therein as prerequisites to the attachment of the insurance are not required by the terms of the policy. The language of the Policy is to be construed in accordance with the principle that 'the test is not what the insurer intended its words to mean but what a reasonable person in the position of the insured would have understood them to mean.'

Watson v. Firemans Ins. Company, 83 N.H. 200, 202, 140 Atl. 169. We think it plain that any reasonable person in the position of the defendant Lambert would have understood from the language set forth in the statement of facts, that when he purchased another automobile to replace the 1930 Pierce-Arrow, his insurance would automatically apply to the replacing automobile *as of the date of its delivery to him. The plaintiff if it had seen fit, might have inserted a provision that the insurance should not attach to the replacing car until the insured had parted with the ownership and possession of the replaced car, but in the absence of any such provision in the policy, these factors of the situation were properly regarded by the trial court as indecisive.*" (Italics ours)

"The finding of the court that the 1935 car 'was purchased for the defendant Lambert's business to replace the 1930 car for the very same use previously made of the 1930 automobile' is fully sustained by the evidence and the conclusion that 'the said policy covered the 1935 Pierce-Arrow sedan at the time of the accident as a logical conclusion'."

It would be very hard to find a case more in point than this. This instant case is even stronger for it eliminated the very thing the appellant in that case relied on; that is: that the defendant still owned the car. In our case the assured had sold and transferred title of the 1935 truck to the Pound Motor Co. He had even transferred his Motor Registration Certificate covering the 1935 truck to the Pound Motor Company.

Suppose that Bunney, after accepting delivery of

the 1938 car and while driving it had had an accident with it; would he not now be shouting lustily that the coverage had left the 1935 truck and had automatically gone to the 1938 truck?

There is no question about the fact that the 1938 truck had been bought to replace the 1935 truck. In fact Bunney had to get rid of the 1935 truck by trading it in on the 1938 truck to get enough money to buy the new truck; even taking the new truck out and putting a mortgage on it to raise the balance of the purchase price of the 1938 truck. The body of the 1935 truck belonged to him. The remainder belonged to Pound Motor Co., lock, stock and barrel.

This provision of the policy is plain and unambiguous and needs no construction.

In *Dean v. Niagara Fire Insurance Co.*, 24 Cal. App. Supp.(2d) 762, 68 P.(2d) 1021, where an automobile liability policy provided that such insurance as was afforded to each and every automobile covered thereunder and owned by the named assured should also apply during the policy period to "any other automobile ownership of which is acquired by the named assured * * * as of the delivery date to him" it was held that the evidence was sufficient to justify a finding that there had been a "delivery" of a replacement of the insured automobile. There being evidence that an injury occured while the insured was driving a new automobile which had not at the time an accident occurred been registered in his name but was so registered subsequently. The insured was driving a new car which he had bought to replace the

old one. The policy contained the usual automatic coverage features the same as ours:

> "3. The insurance afforded by this policy shall automatically terminate upon the replaced automobile *at the time of such delivery.*"

The court said:

> "Still further condensing and interpolating the foregoing language, but not altering its meaning in this case, we find that the material agreement is that 'such insurance as is afforded by this Policy to each * * * automobile * * * owned by the named Insured shall also apply * * * to any *other* automobile, ownership of which is (sometime) acquired by the Named Insured * * * as of the date (not of acquiring ownership but) of *delivery* to him,' and that 'If the Company does not cover all automobiles owned by the Named Insured *at the date* (not of acquiring ownership but of *such delivery*) the insurance shall be applicable only to such other automobile if it replaces an automobile described * * * and * * * shall automatically terminate upon the replaced automobile (not as of date dependent upon its transfer but) at the time of such delivery.'
>
> "There is nothing in the policy to suggest or justify giving the word 'delivery' as used therein any meaning other than its ordinary one, which, in the context quoted, would signify a handing over of physical possession and control of the automobile. The fact that the Motor Vehicle Code (Stat. 1935, pp. 93, 118) provides (Sec. 186) that 'No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose

until transfer of registration is made and the department has issued a new certificate of ownership and registration card' except as therein provided, does not prevent the owner or prospective owner of an automobile from validly contracting for insurance against perils of use dependent upon possession irrespective of the status of registered ownership. *Golden Gate Motor Transport Co. v. Great American Indemnity Co.*, 6 Cal.(2d) 439, 445, 58 P.(2d) 374. Other sections of the Motor Vehicle Code mention delivery (for examples see Secs. 177-179) or transfer of possession of motor vehicles in *de facto* sense, and it is obviously in that sense that the reference is made in the policy here involved. We are satisfied that the evidence is legally sufficient to support the implied findings that prior to the accident described in the complaint the 1935 sedan had been 'delivered' to plaintiff and that it had 'replaced' in his use, as contemplated by the insurance contract involved herein, the 1934 automobile described therein. The evidence also establishes that plaintiff did acquire the legal status of registered owner of such 1935 model not later than January 10, 1936; having acquired ownership of the car, the insurance protection thereon, by the terms of the policy above quoted, attached as of the date of delivery of possession whether that date was prior or subsequent to registration of title."

Again in *Ash-Grove Lime & P. Cement Co. v. Southern Surety Co.*, 225 Mo. App. 712, 39 S.W.(2d) 434, where a "fleet" automobile liability policy provided that it "extended to cover automatically from the date of their acquisition any additional cars the assured may obtain by purchase or trade, provided

the assured shall within thirty days from the date of their acquisition make a report to the company of said cars and pay an additional premium on a pro rata basis," it was held that the policy should be construed as covering all cars owned and operated by the insured during the policy years, and to cover all new cars *immediately upon their acquisition*, and that the provision for reporting the acquisition of a new car was not for the purpose of allowing the insurer to say whether or not it was willing to extend coverage to such car, but was rather for the purpose of covering all cars owned or operated during the policy year, the court stating that at most the provision imposed only a condition subsequent.

Aetna Casualty & Surety Co. v. Chapman (Alabama) 6 Div. 768, 200 So. 425, was a case where the insured took out a policy upon a pick-up Chevrolet truck. He turned the truck over to a garage for repairs and secured from them a truck to use while repairs were being made. With this car he had an accident. He attempted to bring it under the automatic coverage provision of the policy. The Aetna brought a declaratory action to ascertain its rights and the lower court held that the policy covered. The insurance company appealed. The appellate court reversed the decision. The automatic coverage provision is the same as ours and is set out verbatim in the opinion on page 426. The Supreme Court said:

> "Policies of insurance being carefully prepared by the insurer, when containing provisions reasonably subject to different construction, one favorable to the insurer and one favorable to the insured, the construction favorable to the

insured shall prevail. As sometimes stated the insured is entitled to the protection which he may reasonably expect from the terms of the policy he purchases, * * *."

"(4) In giving effect to this rule it is equally important that the contract made by the parties shall prevail, and no new contract be interpolated by construction.

"(5) Provisions clearly disclosing their real intent are not to be given a strained construction to raise doubts where none reasonably exist. No citation of authority need be made in support of these well settled principles.

"This policy does not afford indemnity against liability incurred in the operation of any and every truck in the grocery business. At the time the policy period begins its coverage is limited to the Chevrolet truck alone.

"The automatic insurance is limited to a newly acquired truck. If the insured replaced the Chevrolet truck with another owned by him when the policy was issued, the coverage would not extend to its operation. Paraphrasing the first sentence of the automatic insurance provision to meet the facts, it would read; If Mr. Chapman, the owner of the Chevrolet truck herein described, acquires ownership of a Ford truck, the protection afforded in the operation of the Chevrolet truck shall apply to his operations of the Ford truck from the date of its delivery to him, subject to the following additional conditions.

"Condition (1) admittedly has no application. (This refers to condition (1) of the automatic coverage provision Tr. 78.) It is intended to apply when this form of policy is written up to cover all trucks owned by the insured.

"Condition (2) (of the automatic coverage provision Tr. 78) is to the effect that the insurance shall apply to the Ford truck and may be classified for the commercial use defined in the policy. This clause is primarily to protect the insurer against an additional risk if the new truck be operated in a more hazardous service. If this were the sole condition, and to be read in entire disregard of the contractual provisions touching ownership, our problems would be simplified.

"Condition (3) (of the automatic coverage provision of the policy, Tr. 78) stipulates that the insurance upon the Chevrolet truck automatically terminates when replaced by the Ford truck at the date of its delivery.

"This condition is clear and unambiguous. It means the insurance shall apply to *only one truck at a given time* (Italics ours); that it does apply to the Ford truck, if at all, from the date of its delivery to the insured. Insurance on the Chevrolet is to terminate on same date. This sheds a clear light on the character of acquired ownership in the Ford necessary to bring it within the policy. There is no suggestion of a temporary shifting of coverage to the Ford, and reshifting to the Chevrolet when repaired and put back into service.

"The automatic insurance provision has the effect to write the Ford truck into the policy, and strike the Chevrolet therefrom. Thenceforth, the coverage is of the Ford until the end of the policy period, if other terms of the policy are met."

A case from the federal courts is *Mitcham v. Traveller's Indemnity Company* (C.C.A. 4) 127 F.(2d) 27. In that case the "automatic insurance provision"

which was the same as in our case, was involved. In that case the insured, owning a Buick car purchased a Lincoln Zephyr and in an accident with the Zephyr claimed it was under the policy by virtue of the "automatic insurance provision." He had kept the Buick car but had traded in on the Zephyr a Ford car. He placed the Buick car with the motor company to be kept in storage and sold. He did not transfer title to the motor company.

The court said:

> "A further statement of the facts is necessary to decide whether these contentions should be sustained. Gray purchased the Lincoln Zephyr from the Strowd Motor Company and gave in partial payment a 1938 Ford car which he received from his mother and which was covered by a policy in another company. The title to the Lincoln Zephyr was transferred to Gray and the balance of the purchase price was secured by a chattel mortgage. At first Gray stated to the Motor Company that he would put the fire, theft and collision insurance on the new car in the same company that carried his public liability insurance, *i.e.*, the insurance on the Buick car, but later he placed this insurance with another company. On the same day, January 20, 1940, Gray delivered his Buick to the Motor Company to obtain insurance thereon to protect it against fire and theft, and this was done in another company.
>
> "Gray had been using the Buick car up until the day he acquired the Lincoln Zephyr; but as we have seen he did not trade in the Buick for the new car. He left the Buick with the Motor Company to be kept in storage and to be sold, and stated that if the car could be sold for $500, he

would buy a Mercury car for his mother. He did not transfer the title in the car to the Motor Company. There was a lien on the car and it was arranged that the title should remain undisturbed until a purchaser was found. No purchaser was found and no one used the car prior to Gray's death on February 1, 1940.

"Upon these facts the appellant contends that the Lincoln Zephyr replaced the Buick car within the meaning of Article IV of the policy (the automatic provision clause). It is said that the purpose of the replacement clause from the company's standpoint was to make sure that the company would not insure two automobiles for one premium, and that this purpose was effectuated when Gray bought a new car and abandoned the use of the old one and put it up for sale. It is pointed out that Gray placed fire, theft and collision insurance on the new car, but made no new provision for liability insurance thereon, and it is said that this action evidenced an intent on his part to avail himself of the automatic transfer of the liability insurance covering the old car which he had abandoned to the new car which he was putting into use.

"The purpose of the insurer to cover one car is correctly set out in this argument, but the factual situation does not support the appellant's contention. The evidence supports the finding of the District Judge that the Lincoln Zephyr did not in fact replace the Buick car. Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to

demonstrate it to a customer; and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued. These circumstances distinguish the case from *Merchant's Mutual Casualty Co. v. Lambert*, 90 N.H. 507, 11 Atl.(2d) 361, 127 A.L.R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured."

Another federal case in the District court of New Jersey, *Jamison v. Phoenix Indemnity Co.*, 40 F. Supp. 87, while not strictly in point, is illuminating in holding that the automatic coverage provision applies from the date of acquisition. There the court said:

"We conclude that the provisions of this policy mean that there is automatic coverage from the date of acquisition of the replacing car only in the event that notice is given the insurer within 10 days. Plaintiff has utterly failed in this respect and accordingly, the defendant's motion is granted."

Also to the same effect *Continental Casualty Co. v. Trenner* (D.C.E.D. Penna.) 35 F. Supp. 643.

The Accident Occurred after a Change of Interest of the Assured in the Automobile Without the Written Consent of the Company.

Errors 1, 2, 8, 9, 10, 14

The policy contained the following (Tr. 80):

> "This Policy does not apply * * *
>
> "under any of the above Coverages * * * or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the company."

As previously set out the assured David Bunney on January 4, 1940, the day before the accident sold and transferred the ownership of the 1935 truck to Pound Motor Company, for the sum of $375 as is shown by Automobile Purchase order (Ex. A-1, Tr. 116).

Let us examine the Automobile Purchase order.

He purchased "Used Truck 1938 for $700." Sales tax was $14 making a total of $714. Upon this he was credited "Used car allowance, 1935 Ford truck Motor 1304989 $375, leaving a balance due of $339. Payable as follows:

> " 'Cash payable on Delivery.' This order is not binding until signed and accepted by an authorized member of the firm. No agreements not contained herein will be recognized unless in writing and signed by a firm member. Salesman (Signed) O. A. Pound, Purchaser (Signed) David Bunney, Address 207 So. 11th. Accepted by O. A. Pound."

Then Bunney went to the First National Bank of Mt. Vernon and placed a mortgage on the 1938 truck (Tr. 118, 119, 120, 121) secured the money from the

bank and paid the $339 to Pound Motor Co. Also on this date he delivered to the Pound Motor Co. his Washington State Registration Certificate (Tr. 35, 176). There remained merely the taking of the body from the 1935 truck and transferring a wooden body that he owned and which was on another truck. This wooden body had been viewed by the Pound Motor Co. and accepted by them.

A case in point is *Continental Insurance Co. v. Michaels*, from the Court of Civil Appeals of Texas, 13 S.W. 465.

In this case the insured had a policy of fire insurance issued by the Continental Insurance Co. covering a Ford automobile, which was subsequently damaged by fire. The policy contained a provision that it should be void if

> "the interest of the assured in the subject of insurance be or become other than unconditional and sole ownership, or in case of transfer or termination of the interest of the assured other than by death of the insured, or in case of any change in the nature of the insurable interest of the assured in the property described in the policy, either by sale or otherwise,"

which is similar in effect to our provision which states:

> "This policy does not apply; (2) * * * to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the company." (Tr. 79)

In that case the insured had a salesman who made a sale of the car to a man named Calloway with the

understanding that if he was dissatisfied with it in a day or two he could bring it back and take another Ford sedan that they had for sale. The conditional sales contract was duly signed and filed in the auditor's office. He never came back and the car was found abandoned and burned. The court said:

> "Defendant in error, on the other hand, insists that the transaction with Calloway did not affect defendant in error's interest in the property, because, he says, it passed to Calloway nothing more than an option (that is, a mere right to purchase the coupe if he chose to do so) he never exercised. We agree with defendant in error that if the right Calloway acquired was no more than an option never exercised, the stipulation was not violated; but, giving full effect to the testimony of defendant in error as a witness, referred to in the statement above, and to all other testimony adduced on his behalf, we think it nevertheless conclusively appeared that the right Calloway acquired was more than an option—that he became the owner of the coupe with a right, exercisable within a reasonable time if the condition of the car was not materially changed, to exchange it for the sedan. * * * It is clear, we think, that the interest defendant in error had in the coupe at the time it was burned was not that of an owner, but that of a mortgagee only. * * *"

Pound Motor Company became the owner of the 1935 truck on January 4, 1941, the day before the accident and Bunney had transferred his interest in the truck to them. Can it be said that Pound Motor Company had no interest in the 1935 truck after paying Bunney $375 for it and both parties executing

the papers covering it? Clearly it was the intention of Bunney to pass all his right and title to the 1935 truck to Pound Motor Co. on January 4, 1940, else why had he delivered his Certificate of Title covering it to Pound Motor Co.? Without the Certificate of Title Pound Motor Company could not re-sell the truck.

It seems to us that it is too clear to require argument that this transfer of interest to Pound Motor Company excluded any coverage of the policy on the 1935 truck after that occurred, consequently the accident of the next day was not covered by the policy.

In *Farmers' & Merchants' Insurance Co. v. Jensen,* Supreme Court of Nebraska found in 76 N.W. 577, where fire insurance was obtained upon a dwelling and the policy contained a provision that the policy would cease to be in force "in case any change shall take place in the title * * * of the assured in the above-mentioned property," without the consent of the insurer thereto indorsed on the policy. That the property was thereafter conveyed to a third party and from the third party to the insured's wife. The court said:

> "The judgment of the district court cannot stand. The provision in the policy that it should cease to be in force if a change should take place in the title of the insured without the consent of the insurer is a valid and reasonable provision. An insurance contract is a personal one between the insured and the insurer. An insurance company might be very willing to guaranty against loss or damage of his property by fire, but unwilling to furnish such a guaranty to A's vendee;

> and it is for this reason that such provision as the one under consideration is inserted in fire insurance policies, so that, in case the insured shall transfer his title, the insurer may have notice thereof, and an opportunity to elect whether it will keep the policy in force in favor of the grantee or vendee. And it is because the courts recognize such a provision in an insurance policy to be a personal contract between the insurer and the insured that they hold that the violation thereof by the insured terminates the contract of insurance. *Insurance Co. v. Ketterlin*, 24 Ill. App. 188; *Langdon v. Association*, 22 Minn. 193; *Oakes v. Insurance Co.*, 131 Mass. 164; *Ehrsam Mach. Co. v. Phenix Ins. Co.*, 43 Neb. 554, 61 N.W. 722."

In *Keneagh v. Baker*, 284 S.W. 321, a Texas Civ. case, in passing upon the transfer of interest clause, the court said:

> "Even if it had been shown that the Fifty Cent Auto Company had purchased the cars of the Driverless Ford and Dodge Company and had succeeded the insured, the bond would not automatically pass from the one to the other. The surety company had obligated itself to pay damages resulting from the negligence of the assured and not from the negligence of the vendees of the assured. There is nothing in the ordinance or the rider on the policy that so bound the surety. *It was especially provided in the bond, that 'in case the assured sells, transfers, or disposes of said automobile, all liability shall cease.'*"

Sale of Truck—Passing Title
Errors 1, 7, 9, 10, 11, 14

There is no question but that David Bunney considered the sale of the 1935 truck a closed matter when he delivered his certificate of title to Pound Motor Co. There is no dispute about this testimony as witness the following:

Cross examination of G. A. Pound (Tr. 176):

"Q By MR. PEARSON: * * * Did Mr. Bunney deliver to you the certificate of title on the 1935 truck?

A I can't tell you the day.

By THE COURT: That is admitted in the certificate.

Q Do you know what the certificate of title is?

A Yes, sir.

Q What is it.

A It is a description of the particular truck, motor number and serial number.

Q Where does it come from?

A Olympia, Washington.

Q And the exchange of ownership * * *.

By THE COURT (Interrupting): That is all admitted.

By MR. PEARSON: That particular point isn't covered.

By THE COURT: Oh, yes. It is all admitted. The certificate speaks for itself.

By MR. PEARSON: We haven't got it here.

By THE COURT: Well, it is admitted that it was issued.

By MR. PEARSON: Very well, then you got the certificate on the 4th; that is admitted. That's all."

The court's pre trial certificate, which the court referred to contained the following (page 1 of same Tr. 35):

> "On January 4, 1940, the Registration Certificate for the truck on which the accident happened was delivered to Pound Motor Company * * *." and in the next paragraph: "When the certificate of title was delivered * * *."

On the subject of certificates of ownership the statutes are as follows:

> Rem. Rev. Stat. §6312-2: "It shall be unlawful for any person to operate any vehicle in this state under a certificate of license registration of this state without securing and having in full force and effect a certificate of ownership therefor and it shall further be unlawful for any person to sell or transfer any vehicle without complying with all the provisions of this chapter relating to certificates of ownership and license registration of vehicles * * *."
>
> Rem. Rev. Stat. §6312-4: "(c) The reverse side of the certificate of ownership only shall contain forms for assignment and notice to the director of licenses of a transfer of the ownership or interest of the registered owner and legal owner * * *."
>
> Rem. Rev. Stat. §6312-6: "(a) In the event of the sale or other transfer to a new registered owner of any vehicle for which a certificate of ownership and a certificate of license registration have been issued, the registered and legal owner shall endorse upon the back of their respective certificates an assignment thereof in form printed thereon, and deliver the same to the purchaser

or transferee at the time of the delivery to him of the said vehicle * * *."

It will be seen from this that when David Bunney transferred to Pound Motor Company on January 4, 1940, the registration certificate, he will be presumed to have complied with the statute and completed the assignment on its back divesting himself of all title in and to said truck. Pound Motor Company, being in the business of selling and buying motor vehicles were familiar with this angle of the law and must have required the filling of said form. At any rate no attempt was made in court to deny the full delivery of title on the registration certificate.

An attempt was made by the appellee below to show that the sale was not completed because the truck was not in a deliverable condition. It is our position that this does not make any difference; that upon the *delivery* of the 1938 truck the insurance automatically transferred to it from the 1935 truck and from that moment it made no difference what was done with the 1935 truck. The court seemed to think that the whole point at issue was when the sale of the 1935 truck was complete because the court limited the jury to that one point.

For the sake of that argument let us look into the sale of the 1935 truck. As has been related the parties agreed on the price of the 1938 truck and that the 1935 truck was traded in on the purchase for an allowance of $375 whereupon Bunney took delivery of the 1938 truck paying the balance of $339 completing the payment of the $714 which was the purchase price of the 1938 truck. It will be recalled that Pound went

out and looked at the wooden bed which was to be placed on the 1935 truck in place of the steel one which Bunney wished to retain. He was satisfied with it and the deal went through. Our opponents seemed to rely on Rem. Rev. Stat. §5819-19 which says

> "Unless a *different intention appears*, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> "Rule 2. When there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done."

While we are reading the statutes on Sales we might read some in the same that the court overlooked:

> Rem. Rev. Stat. §5836-42: "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for the possession of the goods."

Remember the purchaser had fully paid for them and had taken the registration certificate for the truck.

> Rem. Rev. Stat. §5836-48: "*What constitutes acceptance.* The buyer is deemed to have accepted the goods when he intimates to the seller the he has accepted them, or when the goods have been delivered to him; and he does any act

> in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

It seems to us that there is no need to consult the statutes for rules to aid in ascertaining the intent of the parties in this case. When the Pound Motor Company delivered the title to the 1938 truck, so that Bunney could go out to the bank immediately and mortgage it to raise the balance of the purchase price and had in their possession the Certificate of Title to the 1935 truck, which we must assume was filled out on the back thereof, assigning all the right, title and interest of Bunney in and to the 1935 truck can it be successfully argued that the title to the 1935 truck had not passed or that Pound or Bunney considered it had not passed?

But counsel says that there remained something to be done to put the truck in deliverable condition. We think not. Pound had viewed the chassis and had viewed the body and had accepted them. It only remained for to put the one on the other and either Pound or Bunney could have done that. Nothing remained to be done to either the 1935 chassis or the wooden body. If the deal depended upon delivery and the putting of the truck in deliverable condition, would Pound have delivered the 1938 truck to Bunney free and clear?

When Pound took title to the 1935 truck, in the shape of the fully assigned and endorsed Certificate of Title, he took all the delivery of the truck he con-

templated was necessary. In the last analysis if Bunney refused to transfer the wooden body on to the truck Pound could have done it himself and brought an action against Bunney for the cost of so doing.

The following is illuminating as to the intention of the parties (Tr. 174):

Direct examination of G. A. Pound:

"Q (By MR. WELTS) Now then, state whether or not that agreement you spoke of with reference to Bunney changing bodies and delivering the vehicle, or agreeing to deliver the vehicle, state whether or not that was made before or at the time that he paid for the new truck?

A It was made just before, I believe, just the day before.

Q Now, on that day that he took delivery of the new truck, did he make any request of you to delay his delivery on the 1935 truck?

A Well, not that day, but a few days after that, he did.

Q What request did he make?

A Well, he came down and said he was very busy. He was to deliver the truck on Monday. He was going to change the bodies on a Sunday and he came down Monday or Tuesday and said he had been very busy and couldn't make the change-over, but would make it in a few days and deliver the truck.

Q Did you agree to that? Did you tell him that was all right?

A Yes, sir, I did.

Q And so, then he actually delivered at a later date, subsequent to that?

A Yes, sir."

Now, it is obvious that the parties recognized the ownership of the truck to be in Pound Motor Company else why should Bunney ask permission to delay the delivery of it a few days more? He knew it was Pound's truck and that Pound would want to sell it to someone else. If Pound had denied the request which he could have done he would in effect have said: "No, I want my truck now, you bring it in." If the deal hadn't been complete certainly Bunney never would have gone to Pound to ask *permission* to keep the truck a few days longer.

Our Supreme Court in a number of cases has passed upon the question of delivery in a sale:

In *Patrick v. Watson*, 55 Wash. 77, 104 Pac. 144, it was held that delivery of a bill of sale was the delivery of the horses involved.

In *Northern Mercantile Co. v. Schultz*, 56 Wash. 394, 105 Pac. 850, the holding was that when poles were sold acceptance constituted delivery.

In *McLeod v. Aberdeen Brewing Co.*, 194 Wash. 418, 143 Pac. 440, the court held that title passed when the property has been identified and appropriated to the contract even if not delivered.

In *Wilson v. Lamping Motors Co.*, 194 Wash. 418, 78 P.(2d) 559, the court held that title passed when Buyers Order, Certificate of Title and Bill of Sale were signed even though the possession of the car remained in the seller.

To the same effect:

Nolley v. Elliott, 50 Ga. App. 382, 178 S.E. 309;

Breakstone v. General Parts Corp., 87 Ind. App 55, 160 N.E. 47;
Reeves v. G. & G. Pumping Co. (La. App.) 151 So. 679.

In *Miles v. Pound Motor Co.*, 10 Wn.(2d) 492, 117 P.(2d) 179, which was the suit by this same plaintiff in the Superior Court of Washington for the recovery of damages for his injuries, this entire matter was before the court. In the lower court the plaintiff had secured judgment against the Bunney Brothers and Pound Motor Co. Pound Motor Co. appealed; Bunney Brothers did not. The Supreme Court of Washington reversed the judgment as to Pound Motor Co. on the grounds that the Bunneys were not the agents of the Pound Motor Co. in changing the bodies but acting for themselves as independent contractors in changing the bodies.

The court said "Title to, and immediate right of possession of the old truck and the wooden body were in appellant (Pound Motor Co.)" page 507.

The appellee here, Wilmer Bunney, by his then Guardian *ad litem*, Miles, in that case took the reverse of his position in this court. Here, at least in the court below, he loudly contended that title to the 1935 truck had not passed to the Pound Motor Co. As illustrative of his position in the Superior Court of the State of Washington, we quote from the decision in the *Miles* case (page 500):

> "Respondent's theory is that the transaction relating to the sale and transfer of the two trucks and the wooden body was fully completed between the parties by the execution of the purchase order and reciprocal acceptance of, and assertion of

title to, the various properties by the respective parties; that, in law, the delivery of the old truck and the wooden body *was effected as of the places where they were then located;* that the subsequent agreement for delivery by David Bunney of the old truck and the wooden body to appellant at its place of business was separate and distinct from the original transaction; that the later agreement was one which, in law, constituted David Bunney the servant or agent of appellant in the delivery of his old truck and the wooden body; and that therefore appellant is liable for the negligence of David Bunney."

The Washington Supreme Court held that although title had passed the transferring of the body was done by the Bunneys as independent contractors or a status similar thereto. The court said (page 508):

> "His status, therefore, if not exactly that of an independent contractor in the usual sense, was at any rate one which is governed by the rules applicable to that relationship, rather than by the rules applicable to master and servant, or principal and agent. Consequently, David Bunney's negligence was not imputable to appellant."

Appellee having blown hot in the state court now proceeds to blow cold in this action as witness the following from his pleading here (paragraph III of complaint, Tr. 4):

> "Appeal was taken from said judgment by the other defendant, and on said appeal the Supreme Court of the State of Washington held that as a matter of law, under the transactions had between Bunney Brothers and the other defendant, *no completed sale of said motor truck had been made* to said motor company at the

> time of said injury, as delivery thereof was an essential part of said sale, and no delivery had been had, and said motor truck was used and operated by David Bunney at the time of injury of said minor, on behalf of the defendants David Bunney and Clarence Bunney, doing business as against said motor company."

And to make no mistake about it witness appellee's opening statement in the court below (Tr. 157):

> "Our evidence produced upon the witness stand, ladies and gentlemen of the jury, will be that Bunney *still had the ownership* of the old 1935 truck, and he continued to have that ownership under the law."
>
> "By THE COURT: We will have the argument later!"

The *Miles* case is of course not *res judicata* here, the parties being different, but we maintain that under the same facts that case is a holding that title to the 1935 truck had passed to Pound Motor Co. That Wilmer Bunney should not be permitted to plead one cause of action in one court and that having failed to suit his purpose reverse his position and plead the contrary here. While Miles was his Guardian *ad litem* there and Bunney is his guardian *ad litem* here, his counsel Welts & Welts are the same in both cases.

The Truck at the Time of the Accident Was Not Being Operated under the Permit of the Department of Public Service.

Errors 1, 10, 13

In the Pre Trial Certificate (Tr. 34) we find that:

> "It is agreed that on the 5th day of January, 1940, pursuant to notice from the W.P.A. Authorities to assemble his equipment for inspection on a W.P.A. hauling job in which the Bunneys' including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors."

It will be noted in this certificate that this was on January 5th, 1940, the day after he had sold the 1935 truck to the Pound Motor Company, and that the notice from the W.P.A. people was on January 5th, also. It will also be borne in mind that he had previously agreed with the Pound Motor Company before the sale that he would transfer the steel body from the 1935 chassis on to the 1938 chassis. This was prior to or on January 4. So the W.P.A. order had nothing to do with the changing of the bodies. He had sold the 1935 truck the day before and it had passed out of his and the W.P.A. service or any other service of the Bunneys. They did not intend to use is any longer after January 4. They were through with it. It was therefore no longer operated under the permit. It cannot be said that the steel body of the 1935 truck was operated under the permit. That

body belonged to the 1938 truck when it was finally put on that chassis.

Attached to the policy will be found (Tr. 56) the following endorsement:

"Associated Indemnity Corporation

110—Truckmen—Hauling under Contract.

"The named Insured having declared, as evidenced by the acceptance of this endorsement that all of the commercial automobiles which he owns will be used during the policy period exclusively for commercial purposes in the business of the W.P.A. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy. It is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named. This endorsement forms a part of Policy No. 253987 issued to David and Clarence Bunney by the Associated Indemnity Corporation of San Francisco, California, and is effective from Dec. 14, 1939.

ASSOCIATED INDEMNITY CORPORATION,
A. A. Anderson, Secretary.
C. W. Fellows, President.

Countersigned at
Everett, Washington
By Clark Salisbury
Duly authorized representative
Clark Investment Company.
Form 110. Uniform Standard Automobile endorsement."

If this endorsement means anything at all, it means that when this truck, the 1935 truck, was used in any other business other than the W.P.A. it was not covered by the policy. This means that when the truck is even used in the business of Bunney Brothers it was not covered. There is no ambiguity in this endorsement; it requires no interpretation; it is couched in simple English and easily understood. While the Bunneys were changing the body, it was not in the service of the W.P.A. and consequently not under the policy. It could not be; the Bunneys having sold the truck the day before.

As to Exclusion of any Person while Entering Upon, Riding In, or Upon or Alighting From, the Automobile.

Errors 3, 13

The endorsement required by law and gotten out by the Department of Public Service and written by them has been previously mentioned herein attached to said policy contains the following:

> "PROVIDED HOWEVER, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached." (Tr. 55, 63)

This is another indication that the coverage of this policy was intended for the general public and not to protect the people in or on or getting into or out of the vehicle.

It will be noted that this provision makes no provision that the automobile or vehicle moving but is

merely limited to "riding in or upon, or entering or alighting from" the vehicle. If the Department of Public Service wished to limit it to a moving vehicle they would have said so. They wrote this endorsement, not the insurance company.

Also this provision is not limited to adults nor does it distinguish between minors or adults; it says "any person." This would include Wilmer Bunney.

What was Wilmer Bunney doing with relation to the vehicle? This is his testimony (Tr. 163):

> "A Well, I took the can from my uncle and I climbed up on the fender, and I couldn't find—well, there wasn't no place, so then I got off again, and then I kind of lay straddle of the fender and poured the gas into the carburetor.
>
> Q You laid straddle of the fender?
>
> A Yes.
>
> Q Were either of your feet on the ground when you were laying straddle of the fender, pouring in the gasoline?
>
> A One of them was; it was kind of dangling like."

And on cross examination (Tr. 164):

> "Q Now, this is a V8 engine?
>
> A Yes.
>
> Q And the carburetor is in the middle, between the two cylinder blocks, is it not?
>
> A Yes.
>
> Q That is quite a ways from the edge of the truck, is it not?
>
> A Yes.
>
> Q It was necessary for you to draw up on the fender to get over there to pour that gasoline in?

A Yes.

Q Now, then do you remember your testimony in the Superior Court?

A Well, I remember most of it.

* * * * * * *

Q I will ask if your testimony there was not this:

'Question: How did you do that?

'Answer: He asked me to pour it in there. The first time I didn't think it was a good idea, me sitting there or standing up there, so I laid down on there and poured it in.

'Question: Laid down on what?

'Answer: On the fender. It was kind of safer and I was kind of afraid of falling, jerking.

'Question: So you laid on the fender and was pouring gasoline into the carburetor of the truck?

'Answer: Yes.'

"That is true is it?

"A Yes."

The coverage of the policy excludes any one while "riding in or upon, or entering or alighting from any automobile covered by the policy which this endorsement is attached."

Now it may be urged that the coverage only covered a car in motion. That cannot be sound reasoning because one does not normally "enter upon or alight from" a car in motion. If a person is excluded that is "entering in or alighting from, or riding in or upon" a car, obviously everybody in or on the car is excluded from the policy. Can it be successfully asserted that a person sitting in the seat just before the car starts on its way or sitting in the seat at the moment

that the car stops is not excluded or that a person getting into the car is excluded and that he is not the second that he remains passive in his seat before the car starts on its way is not? Or that he is excluded from the policy while the car moves to a stop and he half rises up in his seat preparatory to alighting therefrom just before the car stops but that if he remains passive for a moment after the car stops he is under the coverage of the policy while sitting still but that the moment he moves to alight he is excluded?

One does not have to be *in* the cab of the truck to be excluded; the policy says "or upon" so if a person is upon the fender or other part of the truck such as Wilmer Bunney was he was excluded from the coverage of the policy.

In the case of *Provident Life & Accident Ins. Co. v. Nitsch* (C.C.A. 5) 123 F.(2d) 600, where the insured driving his car had come to a stop on his premises and while removing a pistol from the glove compartment of the car was accidentally shot and killed, the court said:

> "The primary defense was that the automobile had come to a stop, on plaintiff's premises, the journey ended, and it could not be said that the deceased was driving or riding in the car within the policy coverage. * * *"
>
> "Its final point that because the automobile had come to a stop, the deceased was not, within the policy coverage, riding in it is equally without merit. It would be difficult, we think to conceive of a case more clearly that of riding in an automobile than the one at bar, unless indeed, the coverage must be considered as clipped at

both the starting and the arriving end of a journey. So that on the one hand, it does not take effect until the car starts rolling. And on the other, it becomes ineffective the moment motion ceases, though in the first case, the insured has gotten into the car which is just about to move and in the second case the insured has not gotten out of the car which has just come to a stop.

"If this construction were right, insured would not be covered while getting into or out of the car for the purpose of riding and the policy would be required to read as though, in lieu of the words used, there appeared in it, the words 'while the car is in motion.' Appellant's theory, carried to its logical conclusion, would require an occupant of an automobile who desired coverage to sit poised for instant flight from the car as soon as motion ceased, and might also involve some quite close distinctions as to the precise point when the motion ceased. This is an unreasonable construction which finds itself supported neither by reason nor by the authorities appellant cites * * *." Citing Blashfield, Cyclopedia of Automobile Law and Practice, Sec. 4126, page 474.

But the courts have passed upon "riding" in a car that is standing still and have held that it makes no difference whether the car is moving or stopped.

In *Johnson v. Federal Life Insurance Co.*, a North Dakota case found in 234 N.W. 661, the assured Johnson was driving with another man in a coupe. They were found in the morning in a mudhole with the water up to the running board. The motor was running and both the occupants were dead. The car was equipped with a heater which was out of order and

the deaths were caused by the inhalation of carbon monoxide gas. The night was chilly and the two men were clothed in overcoats, mittens and caps. The car was out of gear and as has been stated the motor was running independently.

It was argued that the men were stalled and chose to spend the night in the car comfortably while waiting for daylight. Also from the fact that they were dead from carbon monoxide showed that the car had not been driven at the time as it was highly improbable that the car could accumulate enough gas to cause death if the car was being driven or in motion. The court said:

> "It will be noted that the contentions of the appellants rest upon a close literal construction of the policy. It seems to be *assumed that one cannot be riding* in a car unless the car is in motion and that the instant he stops he ceases to ride. The argument negatives any connotation of the word "riding" which would include the mere sustaining of the insured during a period when the car might be stopped on account of some obstacle interfering with the progress of the journey. We are of the opinion that under a reasonable construction the language of the policy conveys such a meaning. It is intended, as we read it, to give double indemnity to an assured on account of any loss resulting from personal bodily injury caused by the happening of a purely accidental event while the insured is subject to a hazard incident to riding in or driving a privately owned automobile. To exclude the inhalation of carbon monoxide gas during a period when the car is stalled in a mudhole on the theory that motion had ceased would be

not merely to adopt a narrow meaning of the language of the contract, but to actually deprive the words used of a portion of their ordinary meaning. The occupants of a car while it is stalled in a mudhole, practically during a time when means of escape in comfort may well be lacking, *is still riding in the car in quite the same sense as a passenger upon a steamship at anchor may be riding the waves.* It has been held that injuries sustained by one in leaping from an automobile in the hope of avoiding impending dangers falls within such a provision (see *Wright v. Aetna Ins. Co.* (C.C.A.) 10 F.(2d) 281, 46 A.L.R. 225) and that one injured in getting out of his car by stepping upon a brick or some other object on the ground was within such a provision (*Southern Surety Co. v. Davidson* (Tex. Civ. App.) 280 S.W. 336). With reference to the contention that the coverage stopped when the car ceased to move, the court in the latter case said (page 337 of 280 S.W.): 'It is true that the automobile that appellee was driving had ceased to move when he undertook to go therefrom, but the terms of the policy did not limit appellee's liability to an injury only when the automobile was in actual motion. The policy is to be most strongly construed against appellant and had it been the intention to limit the benefit to the insured only while he was moving in his automobile, it must be presumed that it would have been so stated in the contract. See, as further lending to support our conclusion, May on Insurance. (2d Ed.) Sec. 534; Couch Cyc. of Ins. Law, Vol. 5, Sec. 1151j." (Italics in these cases ours)

This case seems to be very much in point event to the fact that the car was stalled in a mudhole such as

the Bunney truck was at the time of the accident in the instant case.

An interpretation of the word "riding" in the endorsement under consideration must be given a meaning to effectuate the intention of the parties when the endorsement was added. The object to be attained was the protection of the general public from the operations of this truck and it seems to be clearly also to have been the purpose not to protect any one in, on or getting on or off the truck. In other words any one concerned with the operation or running of the truck or in any manner connected with the truck, either as a passenger, repairman, mechanic or any one else "in or on" the truck.

This angle is covered by two endorsements attached to the policy. One the Department of Public Works Endorsement, which is a compulsory endorsement, and another so called "Passenger Hazard Exclusion Endorsement," which has the same wording as the Department of Public Works Endorsement.

Another strong case on "riding" was the case of *Dorsey v. Fidelity Union Cas. Co.* (Tex. Civ. App.) 52 S.W.(2d) 775. The assured had been hunting and after finishing had entered his automobile and sat behind the wheel while his companion emptied the shotgun of shells. The car was not running. The gun accidentally was discharged and the shot killed the insured. The court held that the insured was operating or riding in the car.

In *Southern Surety Co. v. Davidson* (Tex. Civ. App.) 280 S.W. 336, the assured had stopped his car and was alighting from the car. He accidentally step-

ped on a brick and sprained his ankle. Held that he was not limited to the policy while the car was in actual motion and that he was "operating" the car at the time of the accident. The case quotes from 2 May on Insurance, Sec. 524 which says: "A person may be said to be traveling in a carriage while alighting therefrom, until he had completely disconnected himself and landed. The case also quotes from 5 Joyce on Insurance, page 4992, Sec. 2874, which says:

> "Even though the journey may have terminated by the conveyance in which the assured is traveling having reached assured's destination on that line of traveling, yet the insured is protected in doing the necessary act of leaving the conveyance and until he has safely landed, for until then he is still a traveler by that particular conveyance; and if he sustains an accidental injury at the time of leaving or alighting from such conveyance, such accident arises directly out of an act immediately connected with his being a passenger."

In passing on the similar phase of "operation" of a car, the court in *Stroud v. Board of Water Commissioners of City of Hartford* (Supreme Court of Errors of Connecticut) 97 Atl. 336, said:

> "The word 'Operation' cannot be limited as the plaintiff claims it should be, to a state of motion controlled by the mechanism of the car. It is self evident that an injury may be received after the operator has brought his car to a stop, and may yet be received by reason of its operation. The word 'Operation' therefore must include such stops as motor vehicles ordinarily make in the course of their operation."

Obviously, one need not be in the cab of the truck to be riding. In *Stewart v. North American Accident Insurance Co.* (Mo. App.) 33 S.W.(2d) 1005, it was held that one on the running board was riding within the provisions of a policy which provided that the coverage protected against injury in the wrecking of the automobile "in which the assured is riding." He fell from the running board and was killed.

Similar cases are:

Kennedy v. Maryland Casualty Co., 26 F. (2d) 501;

Fidelity Union Casualty Co. v. Posey, 178 Ark. 1017, 13 S.W.(2d) 32.

Exclusion of Employees While Engaged in the Business of the Insured or in the Operation, Maintenance or Repair of the Automobile.

Errors 1, 5, 6, 12, 14

The question of what constitutes "operating" has been discussed and cases cited and quoted in the previous assignment of error covering "Exclusion of any person while entering upon, riding in, or upon or alighting from the automobile," so we will not repeat the citation or quotations here.

As has been pointed out the policy contained an exclusion (Tr. 80) on page 3, paragraph 5 of the policy as follows:

> "This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which any in-

sured may be held liable under any workmen's compensation law."

And also in the Department of Public Service Endorsement attached to the Policy (Tr. 65), paragraph 6 thereof as follows:

> "This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of the said insured engaged in the *operation* or *maintenance* of any automobile or any other employee of the insured arising out of or in the usual course of the trade, business, profession or occupation of the insured."

It will be recalled that this boy was summoned by his uncle and directed to take a tomato can full of gasoline and get up on the car and pour it into the carburetor when he was hurt.

If he was not engaged in the operation or maintenance of the truck at the time it would be difficult to classify him in any other. They were trying to get the motor running and to get the truck running. What was their whole purpose in their occupation? The only answer possible is that they were operating the truck and if the boy was an employee then he was excluded. If he was not operating or maintaining the truck then certainly he came under the remainder of the paragraph: "arising out of or in the usual course of the trade, business, profession or occupation of the insured."

Taking the policy and the endorsements by its four corners it will be seen that the protection given by the Department of Public Works and the policy and en-

dorsements, was to the general public and not persons in the immediate employ or control of the insured.

It cannot be said that this endorsement was the work of the insurance company and should be most strongly construed against it because this endorsement was required by the Department of Public Service and dictated by them. Therefore construction of any ambiguity should be construed against the Department of Public Service and in favor of the Insurance Company.

Was the boy an employe within the meaning of the policy and the endorsement? It seems to us that he should be so held. It could not be considered that he was a member of the general public for whose protection the policy and endorsements were intended to protect. He was under the immediate control and dominance of Bunney Brothers and whether or not there was any payment for the service is immaterial.

But the court said that this boy was incapable of entering into a contract of labor. Contracts of minors are not void but merely voidable.

On the subject of the contracts of minors we have only to turn to the statute in force at the time:

> Rem. Rev. Stat. §5829: "A minor is bound, not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money and property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority."

So Wilmer Bunney could enter into the employ-

ment of the uncle even for a short period. If he was not an employee he could not be in any other category. He was not a volunteer; the uncle had to call him twice before he would come (Tr. 165, testimony of Wilmer Bunney). Also opening statement of appellee's counsel (Tr. 147, 148):

> " * * * David Bunney then called to this child, who was playing basketball in the yard adjoining—he was a fifteen (13) year old boy, in school, then—to come over to the truck to pour some gasoline into the carburetor. He called him the second time to come over, and the boy came over then, and he handed him a tomato can and told the child to pour the gasoline into the open carburetor."

This we maintain was not the act of a volunteer but a direct employment.

Having shown that Wilmer Bunney was capable of entering into a contract of employment the question remains: was he an employee within the meaning of the endorsement?

Without encumbering this already too long brief with many citations on the question of Master and Servant we will quote only from 18 R.C.L. page 490, under the head of Master and Servant:

> " * * * The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist." Citing *Baltimore Boot, etc., Co. v. Jamar*, 93 Md. 404, 49 Atl. 847, 86 A.S.R. 428; *McColligan v. Penn. R.*

R. 214 Pa. St. 229, 63 Atl. 792, 112 A.S.R. 739, 6 L.R.A.(N.S.) 544. Note 37 L.R.A. 40.

In this case Bunney certainly directed the entire operations. He ordered Wilmer around on the job and commanded him peremptorily to come and do the job. He could just as peremptorily have dicharged him from the job. Can the length of time have anything to do with the matter of employment? Suppose the men worked all afternoon on this job of trying to start the engine and had Wilmer around there helping them in the manner he was. Would it then be denied that he was working for his uncles?

We maintain that he was an employe and came under the exclusions. All of which goes to show that Wilmer Bunney was in the general class of workmen and others who were not intended to be covered under the terms of the policy and endorsements.

It seems to us that nothing could be plainer that that it was the intention of the Department of Public Service to protect the general public; those people outside of the truck or vehicle and to exclude the coverage from those in the truck or having anything to do with its operation, control or maintenance; or riding in, or alighting from said truck. This is repeated in so many ways that one cannot escape the conclusion that this was their intention.

The Court Erred in Removing from the Jury the Question of Delayed Notice.

Error 4

It is conceded that this accident happened January 5, 1940, and was not reported to the insurance company until February 1, 1940.

The policy provides as follows:

> "9. NOTICE OF ACCIDENT, CLAIM OR SUIT. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative."

No excuse was given by the assured as to why notice was not immediately given to the company. It was probably because the assured did not feel that the company was involved and that it did not cover the truck at the time of the accident. The court instructed the jury as follows on this point (Tr. 189):

> "The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pretrial hearing, the notice was sufficient. and timely given, and could not be urged in this suit as against this boy and no prejudice did result to the defendant company in

making the investigation of all witnesses who were familiar with the facts and all of them were then available."

Appellee contends and the court in the Pre-Trial certificate (Tr. 38 and 39) found that because the attorney for the appellee, Mr. Welts, took the insurance investigator to the home of the plaintiff's mother and put him in touch with Daniel Bunney and David Bunney, our insured, that no prejudice resulted from the delayed notice. Remember this was approximately a month after the accident.

It is one thing to interview witnesses immediately after the accident when their views are fresh and uninfluenced by conversations with other friends and advisors and get their statements down in writing and another thing altogether to interview them a month after the accident when all parties have gotten together, considered the legal effect of their statements and agreed on all details of the matter. Self interest rises to the surface and overrides facts that might make dead against the maker of the statement. The mere fact that the insurance company had no evidence to offer that it was prejudiced should not have kept the matter from the jury. The fact that a month after the accident the attorney for the injured party should have taken the investigator around to two parties and our own insured and gotten their stale stories of the accident and transfer of the truck should not weigh against our contract rights. The passage of time beclouds the memory and who can say that if their stories had been taken right after the accident they might have disclosed a different state of

facts from which a different legal conclusion might have been drawn.

Bear in mind that the appellee had no defense to offer as to why the insured had not notified the insurance company of the accident. Not the slightest excuse for not doing so. This being so how could the court withdraw the matter from the jury. This was a jury trial and the jurors were the judges of the facts and the defendant should have had the right to have the jury pass on the matter of delayed notice. We were not permitted to even argue it to the jury.

In *Dowell, Inc. v. United Pacific Cas. Co.*, 191 Wash. 682, the court said in passing on a provision for immediate notice:

> "A provision for 'immediate notice' contained in an insurance policy is not to be disregarded. Its obvious purpose is to enable the insurer to inform itself promptly concerning a given accident, so that it may investigate the circumstances, prepare for a defense, if necessary, and be advised whether it is prudent to settle any claim arising therefrom. The term 'immediate notice,' however, is to be given a reasonable application under the facts and circumstances of each particular case."

In *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, quoting from page 137, the court said:

> "The evidence shows that the respondent caused notice to be sent to the appellant on the 12th day after the death of her husband. Until the death of her husband she was not a claimant under the terms of the policy. This was not an unreasonable delay, and therefore *it was the duty*

> *of the court to submit the question of reasonable time to the jury,* which was properly done." (Italics ours)

If the court having held in this jurisdiction that a delay of only twelve days was properly submitted to the jury how can it be denied that the question should not have been submitted to the jury in the case at bar when the delay was 26 days?

In this same case (*Horsfall v. Pacific Mutual Life Ins. Co., supra*) the court said, page 137:

> "Immediate notice ordinarily means within a reasonable time and with due diligence under the circumstances of the particular case, *of which the jury are ordinarily the judges.* 2 May, Insurance (4th ed.) Sec. 462, *Remington v. Fidelity & Deposit Co.,* 27 Wash. 429 (67 Pac. 989); *Western Commercial Travelers Assn. v. Smith,* 85 Fed. 401 (40 L.R.A. 653)."

Because we have no evidence to offer on the subject except to show the notice was not given promptly should not prevent the question of reasonable notice from going to the jury. In view of the fact that the appellee had not given a syllable of testimony as to any reason or cause for the delay, might have called for an instruction that the insured had forfeited his rights under the policy. He could not urge, as many have, that the accident was so minor that he thought nothing would come out of it; or that he didn't read the policy; or that he phoned the agent, or gave verbal notice; or that the company had waived the notice; the last resort of desperate claimants. The rights of the plaintiff cannot rise any higher than that of the insured.

Koontz v. General Casualty Co., 162 Wash. 77, 297 Pac. 1081, wherein the court said:

> "The respondent, of course, has no higher rights in the policy than has Tefft, and if Tefft cannot recover, he cannot."

Also *Baxter v. Central West Casualty Co.*, 186 Wash. 459, 58 P.(2d) 835, wherein the court said:

> "The rights of Mr. and Mrs. Baxter, the plaintiffs in the first action, are no greater than the rights of J. W. Sparks, the insured, relative to the policy of insurance. If Sparks could not have recovered upon the judgment against himself and Mrs. Sparks, had they paid the same, neither can the respondents Mr. and Mrs. Baxter."

But the court in the instant case said because we had no evidence to offer he would withdraw the matter from the jury. What evidence could we offer? How could we show that we would be prejudiced except to appeal to the jury by argument? How could we show what the statements of these witnesses would have been had we been able to get them before they had the benefit of counsel and the passage of time? We submit that the court was in error in withdrawing this matter from the jury.

CONCLUSION

In conclusion we earnestly submit that the judgment of the court below should be reversed, and the action dismissed for the following reasons:

1. Under the automatic coverage provision, there was no coverage on the 1935 truck, the 1938 truck having been purchased and delivery accepted the day before the accident and because there was a change

of interest in the ownership of the 1935 truck, the insured having sold it the day before the accident.

2. The claimant was entering upon, riding in or alighting from the truck at the time of the accident and is excluded from the policy.

3. The claimant was an employe and was excluded from the provisions of the policy.

4. The truck was not being operated under the Public Service Permit at the time of the accident.

5. The claimant was engaged in the operation, maintenance or repair of the truck at the time of the accident and was excluded.

6. The claimant was under the age of 14 years and was assisting in the operation of the truck at the time and was therefore excluded.

7. The insured failed to give reasonable notice to the insurance company of the accident; the accident happening January 5th, 1941, and no notice given until February 1, 1941.

That in any event a new trial should be granted appellant because of the errors set forth herein.

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